IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

UNITED STATES' REPLY IN SUPPORT OF "UNITED STATES' MOTION IN LIMINE TO EXCLUDE IMPROPER EVIDENCE AND ARGUMENTS RELATING TO LACK OF EFFECT, JUSTIFICATION, REASONABLENESS, OR LACK OF INTENT" [DOCKET # 82]

The United States files this reply in support of the "United States' Motion In Limine to Exclude Improper Evidence and Arguments Relating to Lack of Effect, Justification, Reasonableness, or Lack of Intent" [Docket # 82] hereinafter "United States' Motion Docket # 82." [1]

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[1] This reply addresses issues raised in Defendant B&H Maintenance and Construction, Inc.'s ("B&H") "Response to United States' Motion In Limine to Exclude Improper Evidence and Arguments Relating to Lack of Effect, Justification, Reasonableness, or Lack of Intent" [Docket # 112] hereinafter "Def. B&H Resp. Docket # 112." Defendants Martin and Smith filed motions to join Def. B&H Resp. Docket # 112. *See* "Landon Martin's Motion For Leave to Join Co-Defendant B&H Maintenance & Construction's Response to United States' Motion *In Limine* to Exclude Improper Evidence and Arguments Relating to Lack of Effect, Justification, Reasonableness, or Lack of Intent [Docket # 112]" [Docket # 113] and "JP Smith's Motion For Leave to Join Co-Defendant B&H Maintenance & Construction's Response to United States' Motion *In Limine* to Exclude Improper Evidence and Arguments Relating to Lack of Effect,

I. The Court Should Order Evidence and Arguments Relating to Lack of Effect, Justification, Reasonableness, or Lack of Intent Excluded

The United States requested in United States' Motion Docket # 82 that, consistent with U.S. Supreme Court precedent, this Court prohibit the Defendants from introducing evidence, regarding: (1) any lack of effect of the charged conspiracy or any economic or other justification for the charged conspiracy, including the reasonableness of the bid prices submitted pursuant to the charged conspiracy; and (2) the Defendants' lack of intent to violate the law or bring about anticompetitive effects, because such evidence is not relevant to the *per se* bid rigging conspiracy charged in Count One of the Indictment. This request is not premature.[2] The United States seeks an order, similar to the order entered in *United States v. Suntar Roofing, Inc.*, 709 F. Supp. 1526, 1539 (D. Kan. 1989), aff'd, 897 F.2d 469 (10th Cir. 1990), excluding evidence or argument that is not relevant to determining the existence of a conspiracy. During the *Suntar* trial, the court concluded that the United States established the violation charged and therefore precluded the defendants' evidence of reasonableness, justification, or lack of intent. *Suntar*, 709 F. Supp. at

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Justification, Reasonableness, or Lack of Intent [Docket # 112]" [Docket # 114].

On October 22, 2007, the Court granted in part B&H Maintenance & Construction, Inc.'s Motion for an Extension of Time to Respond to United States' Motion In Limine to Exclude Improper Evidence and Arguments Relating to Lack of Effect, Justification, Reasonableness, or Lack of Intent [Docket # 98]. That Order required the United States to file its reply to B&H's response by November 6, 2007.

[2] On June 1, 2007, the Court adopted the Defendants' proposed case management order. The Court's Case Management Order set forth a briefing schedule in which evidentiary Motions and Notice pursuant to Rule 404(b) were to be filed on October 1, 2007. Order [Docket # 41]. Complying with that schedule, the United States filed its motions related to evidentiary issues on that date.

1539. The Tenth Circuit affirmed the trial court's ruling that the violation alleged constituted a *per se* violation. Therefore, the Tenth Circuit also affirmed the trial court's order that after the United States established the existence of the conspiracy, defendants could not introduce "evidence of the reasonableness and/or economic justification for the alleged activities or evidence of the defendants' lack of intent to violate the law or restrain trade." *Suntar*, 897 F.2d at 472.

The United States' motion should be granted because bid rigging agreements, such as the agreement alleged in Count One of the Indictment, are *per se* violations of Section 1 of the Sherman Act. 15 U.S.C. § 1; *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990). In a *per se* case, "where two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint of trade which violates the Sherman Antitrust Act." *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1161 (4th Cir. 1986). Thus, the crucial issue is whether the conspiracy existed and the defendants took part in it. Accordingly, after the United States has proved the existence of the conspiracy, evidence that attempts to justify or negate or otherwise minimize the effects of the conspiracy, or evidence that attempts to establish lack of intent to violate the law or restrain competition, is irrelevant and inadmissible. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 218-24 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 395-98 (1927).[3]

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[3] The Tenth Circuit as well as other federal Courts of Appeal have applied this Supreme Court precedent to criminal prosecutions of *per se* violations of the Sherman Act, including bid

While the Defendants are entitled to present a defense, they are not entitled to justify their participation in the charged bid rigging conspiracy by offering evidence and argument that: the bid rigging conspiracy was ineffective; the bid prices submitted to BP America Production Company ("BP America"), the victim, by the conspirator companies were reasonable; the victim was not harmed; their actions did not result in other anticompetitive effects; the conduct furthered some competitive or other business purpose; the conduct at issue was somehow justified; or they did not intend by their conduct to violate the law or restrain competition.[4] Such evidence is irrelevant under Rule 401 of the Federal Rules of Evidence and inadmissible under Rule 402 of the Federal Rules of Evidence.

II. B&H Submitted Rigged Bids to BP America Production Company Pursuant to a Conspiracy to Rig Bids For Pipeline Projects

During the Summer and Fall of 2005, BP America solicited competitive bids from two pipeline companies, B&H and Flint Energy Services, Inc. ("Flint"), to build the pipelines it needed to transport natural gas from its wellheads in Southwest Colorado to the rest of the United

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rigging cases. *See* United States' Motion Docket # 82, 3, 3 n.1.

[4] Defendants cite *United States v. Nu-Phonics, Inc.*, 433 F. Supp. 1006 (E.D. Mich. 1977), one of the first cases brought after violations of the Sherman Act became felonies, as a case which rejected the United States' motion to exclude "certain evidence on the ground that it is irrelevant because the offense charged is a per se violation of the Sherman Act." *Id*. at 1010. A closer reading of the case reveals that the United States' motion in limine was, consistent with current Tenth Circuit law, granted in part. "The anticompetitive purpose of the alleged agreement to charge $180 over cost for each hearing aid sold to the state is apparent from the nature of the agreement. There is no evidence other than that which will negate the existence of the agreement itself which can defeat an anticompetitive purpose of an agreement directly to fix or establish prices" *Id*. at 1013.

States. During this time period, B&H and Flint were the only companies that BP America had pre-qualified to bid on its pipeline projects. Since both companies were qualified to do the work, the price bid by each competitor would decide which company was awarded the project. However, instead of competing for these projects as BP America had intended, B&H and Flint agreed to rig the bids they submitted and divided the projects between themselves.

There is no evidence in this case that BP America in any way acquiesced to this bid rigging conspiracy.[5] In fact, when BP America was alerted by a Flint employee of collusion on pipeline projects by B&H and Flint, it reported those allegations to the United States.

Nor does this case present the situation described in *Expert Masonry, Inc. v. Boone County, Ky., Fiscal Court*, 440 F.3d 336 (6th Cir. 2006) or *Sitkin Smelting & Ref. Co., Inc. v. FMC Corp.,* 575 F.2d 440 (3d Cir. 1978). In those cases, a disappointed losing bidder brought **civil** antitrust claims against the bidding authority that had awarded the contract to another bidder, claiming the bidding authority had conspired with the winning bidder to the detriment of the losing bidder.[6] In contrast, in this case two competitors, B&H and Flint, agreed to rig bids, and pursuant to that conspiracy were both awarded contracts by BP America. In fact, of the nine jobs that were rigged, five were awarded to B&H for a total of $2,217,848; four were awarded to

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[5] Even when a court gives an instruction on acquiescence by the bidding authority, a reasonableness instruction is not warranted. *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183, 1196 (3d Cir. 1984).

[6] The plaintiff did not prevail in either case.

Flint for a total of $672,036.[7] Documentary evidence will show that on several projects awarded to B&H, Flint would have submitted lower bid prices than B&H absent the conspiracy to rig bids. As a result of the conspiracy BP America paid substantially more to B&H for these jobs.

III. Conclusion

For the reasons stated above and in the United States' Motion Docket # 82, the United States requests that the Court enter an Order prohibiting the Defendants from introducing evidence regarding: (1) any lack of effect of the charged conspiracy or any economic or other justification for the charged conspiracy, including the reasonableness of the bid prices submitted pursuant to the charged conspiracy; and (2) the Defendants' lack of intent to violate the law or bring about anticompetitive effects.

Respectfully Submitted,

s/Diane C. Lotko-Baker
DIANE C. LOTKO-BAKER
s/Carla M. Stern
CARLA M. STERN
s/Andre M. Geverola
ANDRE M. GEVEROLA
Attorneys, Antitrust Division
U.S. Department of Justice
Midwest Field Office
209 S. LaSalle Street
Chicago, IL 60604

[7] On August 7, 2006, Flint and Kenneth L. Rains, the individual who participated in this bid rigging conspiracy on behalf of Flint, plead guilty to one Count of conspiracy to rig bids. See *United States v. Flint Energy Services, Inc.*, 1:06-cr-00264-REB (D. Colo. 2006), Docket # 16 and Docket # 18.

Tel.: (312) 353-7530
diane.lotko-baker@usdoj.gov
carla.stern@usdoj.gov
andre.geverola@usdoj.gov

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2007, I electronically filed the "United States' Reply in Support of 'United States' Motion In Limine to Exclude Improper Evidence and Arguments Relating to Lack of Effect, Justification, Reasonableness, or Lack of Intent' [Docket # 82]" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

gjohnson@hmflaw.com

hhaddon@hmflaw.com

pmackey@hmflaw.com

stiftickjian@hmflaw.com

patrick-j-burke@msn.com

markjohnson297@hotmail.com

I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane C. Lotko-Baker
DIANE C. LOTKO-BAKER
s/Carla M. Stern
CARLA M. STERN
s/Andre M. Geverola
ANDRE M. GEVEROLA
Attorneys, Antitrust Division
U.S. Department of Justice
Midwest Field Office
209 S. LaSalle Street
Chicago, IL 60604
Tel.: (312) 353-7530
diane.lotko-baker@usdoj.gov
carla.stern@usdoj.gov
andre.geverola@usdoj.gov